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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. [redacted] 37

D. DEL VECCHIO, trading as PEOPLES HARDWARE STORES, AND MERCHANTS MUTUAL CASUALTY COMPANY, a corporation,
Petitioners,

v.

BONNIE L. BOWERS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JAMES E. MCCABE,
Attorney for Petitioners D. Del Vecchio, trading as Peoples Hardware Stores, and Merchants Mutual Casualty Company, a corporation.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

The petitioners, D. Del Vecchio, trading as Peoples Hardware Stores, and Merchants Mutual Casualty Company, having been granted severance from their co-defendant in the United States Court of Appeals for the District of Columbia, Robert J. Hoage, Deputy Commissioner for the District of Columbia U. S. Employees' Compensation Commission, appear individually and separately and by their petition respectfully shows:

Petitioners, D. Del Vecchio, trading as Peoples Hardware Stores, and the Merchants Mutual Casualty Company, a corporation, seeks to have reviewed by this Honorable Court a decision of the United States Court of Appeals for the District of Columbia in a case which arose under the Longshoremen's and Harbor Workers Compensation Act, as applied to the District of Columbia (U. S. C. Sup. II, title 33, Ch. 18; 44 Stat. 1424; 45 Stat, 600).

This case was before the Deputy Commissioner for decision on two separate occasions, was heard in the Supreme Court of the District of Columbia twice on motions to dismiss bills for injunction filed by the respondent, and was twice before the United States Court of Appeals for the District of Columbia.

When the case was first heard before the Deputy Compensation Commissioner he made an award in favor of the petitioners on February 15th, 1932, and rejected the claim for the reason that the respondent had failed to establish by evidence that the duties of the respondent's husband required the use of a gun, or that in using a gun at the time in question, the employee was in any way furthering his master's interests, or that the injury resulting in death arose out of his employment. Bill for injunction, under section 21 of the Compensation Act above designated, was filed by the respondent and the Commissioner's decision was reversed by the Supreme Court of the District of Columbia on June 11, 1932, after hearing on a motion to dismiss respondent's bill, which motion was filed by petitioners and the U. S. Attorney on behalf of Deputy Commissioner Hoage, that Court holding that the death arose out of the employment and that the Deputy Commissioner's conclusions were not binding on that Court.

Petitioners electing to stand on their motion to dismiss, a final decree and mandatory injunction was entered by the Supreme Court of the District of Columbia, from which decree the petitioners noted an appeal to the United States Court of Appeals for the District of Columbia. On a review

of the case for the first time by the United States Court of Appeals for the District of Columbia, (67 Fed, (2nd) 751) that Court reversed the Deputy Commissioner's finding in which the Commissioner had used the language that the claimant had "failed to establish by evidence that the duties of the employee required the use of a gun, or that in using the gun at the time the employee was in any way furthering his master's interests, or that the injury resulting in death arose out of his employment" and decided that there was not substantial evidence to support such a finding of the Deputy Commissioner, but the Court also found that an inspection of the evidence showed that the case was tried before the Deputy Commissioner on the theory of suicide, and that there was no finding one way or another by the Deputy Commissioner on that important and controlling issue in the case, and the case was referred back to the Deputy Commissioner for a finding of fact on the question of suicide, the Appellate Court holding that it was a controverted question of fact as to which there was contradictory evidence in the record and that this question was one for the Commissioner to decide.

The case was then sent back to the Deputy Commissioner under a Decree entered by the Supreme Court of the District of Columbia, in accordance with the decision of the United States Court of Appeals for the District of Columbia, to find the facts as to the claim of suicide, and to award compensation in accordance with the decree in the event that the Deputy Commissioner found that Jeff Bowers did not commit suicide.

The Deputy Commissioner found on the second review of the evidence in the case that the employee involved came to his death by a gunshot wound of the chest of his own hand, as a result of willful intent on his part to injure or kill himself, and that said injury and death therefore while arising in the course of his employment, did not arise out of his employment and the claim was rejected by the Deputy Commissioner.

After this second finding of the Deputy Commissioner the respondent again filed a bill for mandatory injunction in the Supreme Court of the District of Columbia to set aside the second rejection of the claim by the Deputy Commissioner. The petitioners, and also the Deputy Commissioner, through the U. S. Attorney, filed a motion to dismiss the bill, which motion was granted, and from the final decree dismissing respondent's bill of complaint, the respondent filed an appeal to the United States Court of Appeals for the District of Columbia. The United States Court of Appeals for the District of Columbia on its second review of the case reversed the decision of the Supreme Court of the District of Columbia and the Deputy Commissioner and it is this decision which petitioners seek to have reviewed.

STATEMENT OF THE FACTS.

On September 10th, 1931, one Jeff Bowers was employed in the District of Columbia by D. Del Vecchio, trading as the Peoples Hardware Stores, and on that day was at his place of employment in said hardware store, which was located at 1311 7th Street, N. W.

On the day mentioned Jeff Bowers was found unconscious on the floor of the store, located at the above mentioned address, about 10 o'clock a.m., in a dying condition as the result of a gunshot wound, from the effects of which he died within about an hour at Casualty Hospital on the same day, without regaining consciousness, the gunshot wound being just above the heart, the bullet passing straight through the body and coming out the back at a point almost opposite the place where it went in. There were no witnesses to the shooting, and it was admitted that he was shot by a bullet from his own gun, which gun was found in a drawer under the counter a few feet away from where the body was found. There was no evidence of robbery in the store.

He was survived by his widow, the respondent Bonnie L. Bowers, and a minor child, Jeff A. Bowers. These persons, under the provisions of the Compensation Act, were his sole beneficiaries.

At the first and only hearing before the Deputy Commissioner evidence was introduced on behalf of the respondent to the effect that the store where Jeff Bowers worked was in an undesirable, or rough neighborhood, where fights were frequent, and one of the witnesses classified it as a tough neighborhood (R. 46, 50, 51, 56, 60, 73); that previous managers at the store had kept a gun at the store, although Jeff Bowers had never obtained permission from the manager to have a gun at this particular store (R. 79); that a carpenter, John Hoffman, testified he visited the hardware store where Jeff Bowers was employed on the morning of September 10th at about 10 a.m. and that Bowers had told him that a strip that covered the door of the warehouse back on the alley had been broken off, probably the night before, by someone who had broken into the back part of the warehouse and that he wanted Hoffman to put a new strip on the door (R. 64); the location of the door with relation to the main part of the store is shown by a diagram on page 148 of the record: The warehouse room on which the door strip was to be replaced contained wire (R. 68). There was no evidence submitted to show that anything had been taken from the store or warehouse room at the time the strip was broken off the warehouse door the evening before.

A short time before Bowers was found mortally wounded, he, Bowers, had bargained with carpenter Hoffman to repair the broken strip on the door above mentioned and it was while the carpenter was repairing the broken strip on the warehouse door that he heard a noise like an electric bulb bursting in the front part of the store and heard someone groaning. On investigation he discovered the body of Bowers lying near the cash register (R. 64, 65).

Testimony was offered by the widow of Jeff Bowers, by neighbors and relatives as to his happy disposition, that he lived within his means and that he was not given to worry and complaint, and also to the fact that the night before his death he wrote a letter to his mother in Alabama, the contents of which letter was discussed in the Appellate Court's opinion and which will be referred to more fully later in this petition. Jeff Bowers' accounts were found to be in order and his employer testified as to the esteem in which he was held and as to his disposition and health as he observed them.

It was admitted that Jeff Bowers was shot by his own gun. There was no evidence on the counter or in the vicinity of where the gun was found that Jeff Bowers was cleaning the gun at the time the gun was discharged (R. 140, 141).

On behalf of the petitioners the following evidence in brief was introduced:

Dr. James A. Smart, specialist in diseases of the eye, ear, nose and throat, testified that he first saw Jeff Bowers on August 24th, 1931, and that Jeff Bowers told him that in November, 1928, he had had an operation on his left mastoid in a Washington hospital and since that time he had had a discharge, almost continuous from his ear, and that during the two months preceding his visit to Dr. Smart's office he had had considerable pain in his left ear with practically no hearing in that ear (R. 32). He told the doctor that this pain bothered him worse at night, that he could not sleep much, that sometimes he was free from pain for a week or so, but that the pain seemed to be getting worse (R. 33); that on his examination of Jeff Bowers the doctor found there was some pus in the canal of the ear which had a very foul odor, that the drum of his left ear was completely gone and there was some scar tissue present in the middle ear and the doctor was of the opinion that he had had and did have a severe infection present in his middle ear at the time he made this examination;

that the doctor suggested he go to the Episcopal Eye, Ear, Nose and Throat Hospital for an examination and that if certain conditions were found it might be necessary for him to have another mastoid operation (R. 35).

Dr. Smart also testified from the records of the George Washington University Hospital showing that a mastoid operation was performed on Jeff Bowers' ear on November 11th, 1928, the ear cells curetted and a system of drainage established through the canal; that sometimes a mastoid operation will result fatally and that sometimes following a mastoid operation the infection still persists, and that in Bowers' case, after the operation, he had an infection in the middle ear with a discharge of pus from the external ear (R. 37), and if the first operation had been successful Dr. Smart testified no such infection would have been found as was found in his examination of Mr. Bowers' ear in August, 1931 (R. 38). Dr. Smart testifying from the records of the Episcopal Eye, Ear, Nose and Throat Hospital, showed that following Dr. Smart's advice to Mr. Bowers, he, Mr. Bowers, visited the hospital on August 27th, 28 and 29th, 1931, and that an X-ray report on Bowers' left mastoid showed marked sclerosis and obliteration of the cell structures on the left side (R. 40). The record shows that after his visit of August 29th, 1931, Bowers made no further visits to the doctor or hospital and that he was found shot within a period of twelve (12) days from the time of his last visit to the hospital. The doctor testified that Mr. Bowers had not been discharged for further treatment by the hospital on August 29th, 1931, nor did he go back to see Dr. Smart after the first examination (R. 41, 42); Dr. Smart testified that Jeff Bowers complained of severe headaches to him and that the pain in his ear was sufficient to cause the headaches and could very well have been sufficient to have caused him constant pain, sleeplessness and nervousness. (R. 43.)

The testimony of Dr. Joseph D. Rogers given before the coroner's jury investigating the cause of Jeff Bowers' death

was stipulated into the record of the hearing before the Deputy Commissioner owing to the serious illness of Dr. Rogers. This testimony showed that Dr. Rogers performed an autopsy upon Jeff Bowers on September 19th, 1931, at 4 o'clock p.m.; that Jeff Bowers was a white man about thirty years of age, height 6 feet, weight 175 to 185 pounds; that at the time Dr. Rogers made the examination of the deceased, Bowers had no clothing on above the waist; that he had a bullet wound of the chest 3½ inches from the midline and 1¼ inches above the left nipple, going through the chest at about the same level and coming out 1½ inches from the left of the spine; that the lung was punctured; that there was a tremendous amount of hemorrhage inside the left pleural cavity and that there were eight small marks about the entrance of the wound indicating powder burns; that an examination of the outside shirt showed powder marks and that in his opinion death in this case was due to a gunshot wound, left lung, hemorrhage and shock (R. 108, 109), and that from his observation in this case the shot could have been fired by Jeff Bowers, taking into consideration the powder marks and the course of the bullet; Dr. Rogers was of the opinion that there was no doubt that the point of entrance of the bullet was in the front and not in the back and from his observation of the injury that caused his death, Jeff Bowers could have moved after firing the shot, such action depending on how rapid the hemorrhage was, the vitality of the man and how much nerve force he had to make himself move; and the wound was not of such a character as to cause immediate death (R. 109); that he could have taken three or four steps following the shot and that he might have had sufficient strength left, after the shooting, to have gone to a drawer in the counter and placed the gun therein; that Dr. Rogers had seen several cases where persons had shot themselves through the heart and fell and closed a drawer and the pistol would drop in the drawer and the man falling would close the drawer of the bureau or table and a man's ability to do

such an act would be less if he were shot through the heart than if he received a wound such as was described in this case (R. 110).

Dr. Edwin R. Donaldson testified that he was a chemist attached to the Police Department and that on September 10th, 1931, he received a package of clothing from the Detective Sergeant belonging to Jeff Bowers containing one blue shirt, and one pair of B. V. D.'s; that he made an examination of these garments to see if there were powder stains on the shirt and undershirt; that the shirt contained particles of unburned powder in the vicinity of the point of entrance of the bullet just above the upper right-hand corner or right-hand corner of the pocket; that there was no powder burns on the B. V. D.'s; that the pocket was on the left hand side, looking at the shirt from the front it was the upper right-hand corner (R. 100) about four to six inches from the mid-line of the shirt; that he found particles of unburned powder and burned powder and that he had testified at the coroner's inquest that there was a section of the shirt, at the entrance of the bullet, that was charred which showed evidence of close contact with the gun that had been fired and that he would say it was within two to three inches; that the cloth was burned away in the immediate vicinity of the hole (R. 101); that when there is charring it shows that the revolver was held close and there is no charring when the muzzle of a revolver is held more than four to five inches away; that he found charring in this case (R. 102, 103).

Detective Sergeant Floyd A. Truscott testified that on September 10th, 1931, at about 10:15 a.m., he saw the body of Jeff Bowers at Casualty Hospital; that Bowers had just died and there was a wound on his body in the front and in the back, the one on the front being to the left of the mid-line about two inches toward the left nipple; that the wound was on the left side of the body and the bullet had passed directly through the body from the front to the back; that the investigation at the store where Bowers worked, con-

sisted of obtaining data as to where the body was found, locating the bullet, the gun and ejected shell, and questioning the man who found the body, the last customer who was in the store and also conversation with the brother-in-law of Bowers (R. 85); that he found the bullet had penetrated a paint can back of the drawer in the counter near the rear part of the store; that Dunn, brother-in-law of Bowers, called his attention to the drawer in the counter and the fact that Bowers usually kept a gun in there; that he found the gun in the drawer with the muzzle pointing towards the direction in which the drawer opened; that in the drawer were several fresh blood stains, also on the edge of the counter right above the drawer were one or two blood stains; that the drawer was not entirely closed, but the edge of the drawer was flush with the edge of the counter; that there were several cartridges in the magazine; and he also noticed where the bullet had hit a paint can the same height from the floor as the bullet would be when passing through a man of the height of the deceased (R. 86, 87); that the empty revolver shell was found about twelve to fifteen feet away at a point where if Bowers were standing facing the middle of the store, behind the drawer, and had had the gun pointed towards him and shot it off, that one could reasonably expect to find the shell where this shell was found, from a gun which had an automatic ejector on it such as this gun had (R. 88); that he was present at the time Lieut. Fowler made the ballistic test of the gun, of the shell and the bullet, and the bullet and shell were both fired from Bowers' gun (R. 89); that there were no finger prints on the gun; that on examination by the Deputy Commissioner, Detective Sergeant Truscott stated that powder will stain up until twelve inches and if a gun is fired at point blank range it will have its effect on a very small area and as the gun is brought back the area spreads, but the density decreased; that the powder stains in this case were small in diameter, showing that the gun had been fired from practically a point blank range; that the stain was a very

small area around where the bullet itself penetrated (R. 91); that Truscott identified Benjamin Albert Dunn, whose testimony has been previously given in some detail, as having told him on the day of the shooting at the store that he was the brother-in-law of the deceased and that said Benjamin Albert Dunn had told him, Detective Truscott, that the deceased had been rather despondent recently and that some time ago the deceased had been operated on for ear trouble, and that he had recently been to the doctor again for treatment and that he seemed to be feeling right bad about the trouble he was having with his ear; that this conversation took place within two hours after the shooting while he was investigating the case in the store (R. 93, 94); that Dunn volunteered this information; that when the gun was found there were four shells in the gun (R. 95); that the gun was not fully loaded; that there were no finger prints on the gun—just the sides of the finger, not enough to develop a finger print (R. 96).

The question in controversy was whether the decedent killed himself intentionally or accidentally.

On behalf of the respondent evidence was given as above described tending to show that Jeff Bowers was in good health with no worries and with happy marital relations; that an attempted robbery at the store was made the night before and that as he was killed during working hours the inference was that his death was accidental and arose out of and in the course of his employment, particularly in view of the presumption under Section 20 of the Compensation Act above mentioned.

The contention of your petitioners is that there was ample evidence in the record to support the deputy commissioner's finding of suicide as a matter of fact and if there was evidence to support such a finding the court could not disturb such a finding of fact, nor should the Appellate Court have weighed the evidence which was given before the Deputy Commissioner.

QUESTION PRESENTED.

The controlling question in this case is whether the United States Court of Appeals for the District of Columbia, in view of the decisions of the Supreme Court of the United States in the case of *Crowell, Deputy Commissioner*, v. *Benson*, 52 S. C. R. 285, and *L'Hote* v. *Deputy Commissioner*, 52 S. C. R. 499, and *Voehl* v. *Indemnity Company of North America*, 53 S. C. R. 380, erred in refusing to give conclusive and final effect to the findings of fact of the Deputy Commissioner as contained in the compensation order and rejection of claim, filed January 30th, 1934, in the statutory review limiting the Court upon review to the sole inquiry whether the compensation order was "not in accordance with law"; or, in other words, whether that Court erred in delving into the conflicting evidence to reweigh the facts presented before the Deputy Commissioner in the face of substantial evidence in support of the finding of fact contained in the compensation order.

JURISDICTION.

Jurisdiction to issue the writ prayed for is conferred upon this Honorable Court by Section 240-A of the Judicial Code, as amended.

The following points are submitted as being substantial grounds for granting the petition and issuing the writ.

1. Sec. 240-A of the Judicial Code as Amended by the Act of February 13, 1935, chap. 299, sec. 1; 43 Stat. 938, U. S. Code Title 28, Sec. 347a.

2. That the United States Court of Appeals for the District of Columbia in reversing the Deputy Commissioner's decision failed to follow the rulings of this Court and is in conflict with the decision of this Court in *Crowell, Deputy Commissioner*, v. *Benson*, 285 U. S. 22, 52 S. C. R. 285, *L'Hote* v. *Deputy Commissioner*, 52 S. C. R. 499, and *Voehl* v. *Indemnity Company of North America*, 53 S. C. R. 380.

3. The case comes directly within the scope of paragraph (c) of Rule 38 of this Honorable Court in that the United States Court of Appeals for the District of Columbia has decided a question of general importance involving construction of a statute of the United States, which has not been, but should be settled by this Honorable Court.

4. The decision complained of is untenable and contrary to the evidence in the case; and it results in a substantial denial of justice.

WHEREFORE, petitioners respectfully prays that the Writ of Certiorari be issued out of this Honorable Court directed to the United States Court of Appeals of the District of Columbia commanding it to certify to this Court for its review and determination a full and complete transcript of the record and all proceedings in case No. 6326 entitled on its docket *Bonnie L. Bowers* v. *Robert J. Hoage, Deputy U. S. Employees' Compensation Commissioner for the District of Columbia;* D. Del Vecchio, trading as Peoples Hardware Stores; and Merchants Mutual Casualty Company, a corporation; and that the judgment entered in said cause by the United States Court of Appeals for the District of Columbia may be reversed; and for such other and further relief as to the Court may seem meet and proper.

JAMES E. MCCABE,
Attorney for Petitioners D. Del Vecchio, trading as Peoples Hardware Stores, and Merchants Mutual Casualty Company, a corporation.

BRIEF IN SUPPORT OF PETITION.

SECTIONS OF COMPENSATION ACT INVOLVED.

Title 33, Chapter 18, U. S. C. A.:

Section 902:

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury and includes an injury caused by the willful act of a third person directed against the employee because of his employment.

Section 903:

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

Section 920:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary that

(a) That the claim comes within the provisions of the Act.

* * * * * * * * *

(d) That the injury was not occasioned by the willful intention of the injured employee to injure himself or another.

Section 921:

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in the order, and instituted in the Federal District Court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia,

if the injury occurred in the District). The orders, writs and processes of the court in such proceedings may run, be served and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the Deputy Commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the Court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto that such irreparable damage would result to the employer and specifying the nature of the damage.

ARGUMENT.

Can the Court Weigh the Evidence Submitted Before the Compensation Commissioner for the Purpose of Arriving at a Different Conclusion than the Deputy Commissioner.

The United States Court of Appeals for the District of Columbia in its first decision in this case of November 13th, 1933, 67 Fed. (2d) 751, stated with reference to the evidence disclosed at the hearing relating to the question of suicide:

> "• • • but an inspection of the evidence shows that the case was tried before the deputy commissioner on the theory of suicide, but there was no finding one way or the other by the Deputy commissioner on this important, and, as we think, controlling issue in the case. The statute bars recovery in the case of suicide. (Act March 4, 1927, c. 509, sec. 3, 44 Stat. 1426; title 33, U. S. C. A. sec. 903) The deputy commissioner should, as we think have made a finding of fact on this question. He saw the witnesses and observed their demeanor and is better qualified than we are to pass on this question of fact. The act contemplates that he shall do so, and the regulation promulgated for his guidance directs him to. If we should decide the question for him we would be passing on a controverted question of fact as to which there is contradictory evidence in the record. This is clearly contrary to the intent of the act. In these circumstances we think the case should be returned to the deputy commissioner with instructions to find the facts as to the claim of suicide • • •"

In view of the statements made by the United States Court of Appeals for the District of Columbia in its decision of November 13, 1933, it is not clear as to how the Court could render the decision appealed from in this case, as the first opinion of November 13, 1933, correctly expresses the law as established by other precedents in that Court, in the U. S. Circuit Court of Appeals, Ninth Circuit, and decisions of this Honorable Court.

The United States Court of Appeals for the District of Columbia in its first opinion quoted above admits that the deputy commissioner saw the witnesses and observed their demeanor and was better qualified than the Court to pass on the question of fact involved in this case. The Court also states on this controverted question of fact, namely, suicide, there was contradictory evidence in the record and that it was clearly contrary to the intent of the Act that the Court should attempt to make a decision on a controverted question of fact.

This first decision of the Court of Appeals of the District of Columbia of November 13, 1933, is clearly supported by its previous decisions on compensation cases in the case of *Powell* v. *Hoage*, 57 Fed. Rep. (2d) 766, decided March 21, 1932; and in the case of *Hoage, Deputy Commissioner, et al.* v. *Employers Liability Assurance Corporation, Ltd.*, 62 D. C. Appeal cases, page 77, on which application for certiorari was denied by this Honorable Court.

In the case of *Powell* v. *Hoage*, 57 Fed. Rep. (2d) 766, *supra*, the United States Court of Appeals for the District of Columbia in closing its opinion stated:

> "While, therefore, we might have reached a different conclusion on the evidence, we feel that we may not, under the rule we have announced, substitute our judgment for that of the commissioner, and, since, we may not, it follows that we must affirm the act and decision of the Court below."

In the case of *Hoage, Deputy Commissioner, et al*, v. *Employers Liability Assurance Corporation, Ltd.*, 62 D. C. *Appeal cases*, 77, *supra*, the United States Court of Appeals for the District of Columbia, in commenting on the powers of the deputy compensation commissioner under the compensation act for the District of Columbia, stated:

> "In the case of *Crowell* v. *Benson*, 285 U. S. 22, 46, 52 S. Ct. 285, 291, 76 L. Ed. 598, the Supreme Court

stated that 'as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the Deputy Commissioner, supported by evidence, and within the scope of his authority, shall be final'. And in this Court and in the other Federal Appellate Courts the rule is well established that mere conflict in the testimony, or a preponderating weight of evidence will not justify disturbing the findings of the Commissioner. Except as to so-called 'constitutional rights' the decision of the Commissioner is final where there is evidence to support it, and the award made by the Commissioner in such circumstances can be set aside only and if not in accordance with law".

In the case of *Pacific Employers Insurance Company, a corporation, and Western Terminal Company, a corporation,* v. *Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District, and Mary Hansen, appellees,* 61 Fed. Rep. (2d) 101, decided September 17, 1932, which case arose under the provisions of the Longshoremen's and Harbor Workers Compensation Act, which is applicable in the District of Columbia, the United States Circuit Court of Appeals for the 9th Circuit, speaking of the powers of the Deputy Commissioner, said:

"considering the case presented, it needs scarcely be stated that in deciding questions of fact the Deputy Commissioner acted with authority to make a final judgment. Conflict in testimony must here be disregarded; preponderating weight may not be measured. The court may only inquire whether an essential matter of fact has been found without supporting evidence." Citing Crowell vs. Benson, 285 U. S. 22."

In compensation cases the Deputy Commissioner sits as court and jury and decides both the law and facts in a case.

In the case of *Crowell* v. *Benson*, 285 U. S. 22, 52 S. C. R. 285, this Honorable Court, speaking of the powers of the Deputy Commissioner, said:

> "* * * that the act contemplates that as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method of dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task * * *.

It is apparent from the wording of the second decision of the United States Court of Appeals for the District of Columbia in the instant case (R. 165) that the Court attempted to weigh the evidence which impelled the Deputy Commissioner in reaching his decision, but, in reviewing what was in the Deputy Commissioner's mind and the justification for his conclusions, the fact was lost sight of that the Deputy Commissioner may not have believed some of the testimony which was offered at the hearing on behalf of the respondent and it is believed that this is a very important factor in this case.

The decision of the United States Court of Appeals for the District of Columbia apparently takes for granted that full weight should have been given to the testimony offered on behalf of the respondent as to the health of the employee, his cheerful disposition, the so-called attempted robbery, and the rough neighborhood in which the store was located, but, it failed to consider that this testimony as to the health and spirits of the employee prior to the shooting might be disregarded by the Deputy Commissioner in its entirety in view of the testimony of Detective Sergeant Truscott of the Homicide Squad of the Police Force of the District of Columbia (R. 85) to the effect that on the morning of the shooting the brother-in-law of the deceased, Benjamin Albert Dunn, told him that the deceased, *had been rather despondent and that some time ago, he, the deceased,* had been operated on for ear trouble and that the deceased had been

to the doctor again for treatment and seemed to be feeling right bad about the trouble he was having with his ear. It must be remembered that this same Benjamin Albert Dunn, brother-in-law of the deceased was one of the witnesses who testified on behalf of the respondent and he gave testimony prior to Detective Truscott being put on the stand, as to the jolly disposition of the deceased, that he had visited the deceased and his wife up to the time of his death and that the deceased was very cheerful and that he noticed no change in the attitude of the deceased whatever until the time of his death (R. 49, 54).

It is also significant that after Detective Sergeant Truscott of the Homicide Squad gave this testimony about the conversation with the said Benjamin Albert Dunn that no testimony in rebuttal of Detective Sergeant Truscott's statements was offered at the hearing.

The court in its opinion also states that the store in which Bowers was working was in a neighborhood notoriously dangerous, and "where robberies were numerous" (R. 164), but these statements of the Court are not borne out by the testimony as there is no evidence in the record showing that the store was in a notoriously dangerous neighborhood, nor is there any evidence by police reports, or otherwise, that robberies were numerous in the vicinity.

The respondent testified that the store was in a very rough neighborhood (R. 46); Benjamin Albert Dunn, brother-in-law of the deceased worked at the same store about eight months (R. 50) and testified that it was a very undesirable neighborhood, that fights were frequent, but that he knew of no attempted robbery or burglary in the neighborhood while he was working there (R. 51); Hiram Kermit Dunn, brother-in-law of the deceased worked at the same store about eight months (R. 56) and he stated that the store was in a bad neighborhood, that there were fights going on and "things like that"; John Hoffman testified that the store was in a colored neighborhood, that there were frequent fights there, mostly in the evening (R. 73)

that 1311 7th St., N. W.—where the store was located—was a pretty rough street; and Samuel Del Vecchio, the owner of the store testified that the store in which Bowers worked was in a colored neighborhood and that it was "a tough neighborhood" (R. 60).

Was the Order of the Deputy Commissioner Supported by Substantial Evidence.

A careful review of the evidence in this case discloses that respondent's witnesses testified principally as to the good health and family life of the deceased prior to his death, and as to the character of the neighborhood in which the store was located, together with the facts surrounding the finding of the body of the deceased.

There were no witnesses to the shooting which resulted in the death of the deceased, nor was there any evidence that a robbery had been committed in the store.

The Deputy Commissioner saw the witnesses in this case, heard their testimony, observed their behavior, and he probably was in the best position for judging as to the weight to be given to their testimony as compared to the weight to be given to the testimony offered on behalf of the petitioners.

As regards the testimony offered in behalf of the petitioners, the commissioner could have favorably considered the testimony of Dr. Joseph D. Rogers to the effect that from the nature of the wound, the powder marks at the entrance to the wound and the course of the bullet, that he, Dr. Rogers, was of the opinion that the deceased could have shot himself (R. 109).

The testimony of the chemist, Dr. Edwin R. Donaldson, attached to the Washington Police Department, could have been given substantial weight by the deputy commissioner as he examined the shirt and undershirt of the deceased and he testified that a section of the outside shirt at the entrance of the bullet was charred, which showed to him

evidence of the close contact with the muzzle of the gun, and in his opinion where there was charring it showed that the revolver was held close as there is no charring when the muzzle of a revolver is held from four to five inches away (R. 101, 102, 103).

The testimony of Detective Sergeant Floyd Truscott could also have been given substantial weight in the mind of the Deputy Commissioner as he testified that the powder burns in this case were small in diameter showing that the gun had been fired from practically a point blank range and that the stain was very small in area around where the bullet itself penetrated (R. 91).

The Deputy Commissioner could have given weight to the testimony of Detective Sergeant John C. Dalglish of the Homicide Squad to the effect that when he examined the premises on the morning of the shooting there was no evidence around the counter or above the drawer where the gun was found to show that anyone had been cleaning the gun as the counter was in order and there were several display cards on it and nothing had been disturbed (R. 141).

There was no evidence in the record that Bowers had been killed by any intruder, the cash register tallied and everything seemed to be in shape around the store according to the employer's testimony (R. 80, 81, 82).

It is also earnestly urged that the testimony of Dr. James A. Smart as to the condition of the deceased's ear only a comparatively short time before the shooting, the statements made to the doctor by the deceased regarding his condition, the possibility of another serious operation on the same ear which had been operated on previously, and the statement made by the brother-in-law to Detective Sergeant Truscott at the store on the morning of the shooting, could have influenced the Deputy Commissioner in reaching the conclusion which he did in this case, when considering the fact that the muzzle of this revolver in question was pointed straight at the chest and the bullet from

the gun entered just above the left nipple and passed directly through the man's body on practically a straight line. The manner in which the gun was held close to the body so that the muzzle was at a point blank range as was evidenced by the charring of the shirt and the powder marks, could have been considered substantial evidence by the Commissioner that the gun was intentionally placed there by the deceased for the purpose of shooting himself and that therefore the gun did not go off accidentally.

The letter mentioned in the Courts opinion as having been written by the deceased to his mother the night before his death could easily have had two meanings in view of the evidence submitted in this case. The Court in passing upon the same simply quoted the last part of the letter (R. 164), but, in view of the evidence offered on behalf of the petitioner in the hearing before the Commissioner the first part of that letter (R. 135) might be considered very significant, especially when viewed in the light of the testimony offered by the neighbors and relatives of the deceased to the effect that the deceased, prior to his death, was in excellent health and spirits. The first part of this letter reads as follows (R. 135):

> Wednesday night, Sept. 9, 1931.
>
> Dear Mother: Will try and answer your letter received before you left Mich. Guess you thought I wasn't going to answer but I haven't been feeling so good
> * * * ,,

Certainly the first part of this letter is not optimistic as regards his health and spirits and the Deputy Commissioner could have considered this part of the letter with other evidence offered on behalf of the petitioners, together with the statements made by Benjamin Albert Dunn in the store the morning of the shooting and thereby have reached the conclusion which was evidenced in his finding.

The Court's decision complained of in this case (R. 165) calls attention to the fact that there is

"* * * much unfortunate precedent from men looking into the wrong end of guns held in their own hands with no intention of suicide yet with tragic results * * *"

The evidence shows in this case that Bowers was not shot in the head so that it could hardly be stated that he was looking into the wrong end of the gun. Placing the gun in the position which it must have been held so that the muzzle was pointing close to the body just above the heart and was fired at practically point blank range with the man in a standing position could have very likely convinced the Commissioner that the wound was self inflicted.

It must be remembered that the bullet in this case did not transverse the body on an angle such as very likely would have happened had the gun gone off accidentally while it was being casually examined in the man's hand. The Commissioner could well have reached the conclusion that a person would not normally examine a gun by placing the muzzle up against his left breast.

Certainly this inference is a reasonable inference from all the circumstances and facts in this peculiar case where the shot was not witnessed.

We do not believe that it can reasonably be stated that the evidence given on behalf of the petitioners before Deputy Commissioner Hoage was not substantial evidence. Apparently it was not considered as substantial in view of the Court's decision in this case, but, it is respectfully submitted that all the facts in this case must be considered and if the evidence offered on behalf of the petitioners as above enumerated, is substantial, it is respectfully submitted that the Deputy Commissioner's decision should not have been reversed in view of the law established in the decisions hereinbefore quoted.

Presumption Under Section 920 of the Act is Not a Substitute for Facts.

Section 920, paragraphs (a) and (d) of the Compensation Act hereinbefore quoted presumes that a claim comes within the Act and that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself, and these presumptions are given great weight in the decision of the Court in the instant case (R. 165). It is earnestly contended however that such statutory presumptions in compensation cases have been considered by the Courts as not being substitutes for facts:

Eldridge v. *Endicott Johnson & Co. et al.*, 126 N. E. Rep. 254.
Collins v. *Brooklyn Union Gas Company*, 171 Appellate Division, 381, 156 N. Y. Supp. 957.
Russo v. *Jarvis Stores*, 193 N. Y. Appellate Div. 587.

Unwitnessed deaths, although happening on the premises, are not necessarily brought within the provisions of the Compensation Act, notwithstanding the presumptions under the Act. In the case of *Burak* v. *City Hall Garage*, 247 N. Y. Supp. 887, also reported in 10 *Industrial Bulletin*, N. Y., page 126, the facts involved a garage foreman who was found dead on the employers' premises. About ten minutes before his death he was seen alive by a customer and at that time was apparently polishing an automobile. About ten minutes later another customer found him lying dead on his back with a bullet wound horizontally through his chest. Powder stains were upon his shirt and skin. There was no evidence of robbery. A small old-fashioned revolver was found about six feet from where he lay and under the end of a sedan belonging to a police sergeant. The testimony was that the deceased was a man of steady habits, a good father, cheerful of disposition and without financial or other worries. On his way to work he had left an order for luncheon at a restaurant near his place of

work with an expressed intent to come in for it later. A referee awarded death benefits to his wife and children. The Industrial Board holding that the presumptions of Section 21 of the Workmen's Compensation Law of New York against suicide had been overcome, rescinded the award and disallowed the claim. The appellate Division unanimously affirmed the denial.

In the case of *Joseph* v. *United Kimono Company*, 194 N. Y. App. Div. 568, 185 N. Y. Supp. 700, decided in 1921, the deceased employee went from a part of the plant where he worked to an open window of an unoccupied room, and was soon afterwards found on the sidewalk several floors beneath barely breathing. It was proved that he died within a few minutes after being found and it further appeared in view of the height above the floor and depth of the window, that he could not have accidently fallen but was either bent on suicide or crazed with a pain in the head from which he was then suffering. An award of compensation in favor of his widow was set aside and the claim dismissed. The Court held that upon no reasonable construction could the casualty be brought within the meaning of the term "accident", saying:

> "It might be reasoned that the deceased, in a crazed condition caused by the pains in his head, had rushed to the window and thrown himself therefrom. If there were the fact, then either the deceased consciously intended to commit suicide, or if temporarily insane, was impelled to throw himself from the window by causes not attributable to his employment so that in either case could there be recovery."

The Court of Appeals of the State of New York on March 12th, 1935, affirmed a decision of the State Industrial Board in the case of *Dubinsky* v. *Kofsky & Gilman*, reversing 242 App. Div. N. Y. page 342, without opinion. This case is reported in Volume 14 Industrial Bulletin N. Y., page 78 — N. Y. —. The facts in this case were as follows: The em-

ployers, Kofsky & Gilman, conducted a tailor shop on the forty-second floor of a New York City building. On the same floor was a fire tower room in which their employees sometimes waited for the opening of the shop which occurred anywhere from 7 a.m. to 7:30 a.m. At about 6:45 a.m., on September 26, 1932, the employee, Dubinsky, forty-six years old and usually earliest to arrive, ascended the elevator. At 7:30 a.m. someone heard the thud of his body, as it struck the roof of an adjoining building far below. There were no eye witnesses to his fall. It evidently occurred from an unencased opening in the fire tower. An iron bar stretched across the opening. Upon claim of his widow for benefits, the death referee held from all of the circumstances that he jumped out of the opening. The Industrial Board denied benefits to the widow. Upon appeal, her attorney contended that the tower was connected with the employment as a waiting place and that the presumptions of Par. 21 of the Workmen's Compensation Law entitled her to an award. The Appellate Division, on November 12, 1934, reversed the Board's decision and remitted the claim with opinion holding that the fire tower was part of the employer's premises because it was the employees' only available waiting place, that waiting for work to begin was in line of duty, and that the presumptions against suicide had not been overcome, but on January 11, 1935, granted a motion for leave to appeal to the Court of Appeals and certified to it as questions of law: "1. Is the decision of the State Industrial Board dismissing the claim supported by the evidence? 2. Did the decedent meet with an accident which arose out of and in the course of the employment?" The Court of Appeals, answering the first question in the affirmative and not answering the second, reversed the Appellate Division's order and affirmed the decision of the State Industrial Board.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that a rule of law heretofore expressed by this Honorable Court as set forth in decisions above quoted, may not be departed from by the lower Court, and that to such an end a writ of certiorari should be granted, and that this Honorable Court should review the decision of the United States Court of Appeals of the District of Columbia in this case and finally reverse it.

Respectfully submitted,

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